

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

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MARK LEYSE, individually and on behalf of all :
others similarly situated, :

No. 13-cv-5794 (AKH)

Plaintiff, :

- against - :

LIFETIME ENTERTAINMENT SERVICES, :
LLC, :

Defendant. :
----- x

DECLARATION OF TRACY BARRETT POWELL

Pursuant to 28 U.S.C. § 1746, I, TRACY BARRETT POWELL, declare and state as follows:

1. I am Vice President, Distribution Marketing at A&E Television Networks, LLC ("AETN"). AETN is a global entertainment media company with ten distinctive cable television channels including Lifetime®. AETN officially acquired Lifetime® as of September 15, 2009 as part of its acquisition of defendant Lifetime Entertainment Services, LLC ("Lifetime" or "Defendant"). I submit this declaration in support of Defendant's motion for summary judgment. This declaration is based on personal knowledge and/or information supplied by persons employed by AETN.

2. I held the position of Vice President, Distribution Marketing for Lifetime at all times relevant to the events at issue in this lawsuit. My responsibilities at that time included, among others, creating and executing partnerships with Lifetime's cable distributors in order to publicize Lifetime's programming.

3. On August 20, 2009, Season 6 of "Project Runway" began airing on the Lifetime channel after having been telecast on the Bravo channel for its five previous seasons. [See Ex. AA].¹ At approximately the same time, on August 19, 2009, Time Warner Cable moved Lifetime from Lifetime's long-held position at Channel 12 to Channel 62 on the Time Warner Cable channel line-up (the "Channel Change"). [See Ex. AA]. The Channel Change impacted Time Warner Cable customers in New York City.

4. In approximately July 2009, in anticipation of the impending Channel Change and the scheduled Season 6 premiere of "Project Runway," Lifetime employees from various departments (including distribution, marketing, and publicity) began thinking about various ways to notify Time Warner Cable customers about the show's move from Bravo to Lifetime and the planned Channel Change. [See Ex. AA]. The ideas we batted around were aimed towards apprising customers of the Channel Change; they were not designed or meant to market Lifetime.

5. Lifetime considered numerous methods to inform its viewers about the Channel Change, including emails to registered users of Lifetime.com who were in the New York City footprint for Time Warner Cable; a "crawl" on Time Warner Cable Channel 12 updating viewers that Lifetime had moved to Channel 62; television commercials informing Time Warner Cable viewers of the Channel Change; an "on hold" message that Time Warner Cable viewers would hear while waiting on the telephone for customer service from Time Warner Cable; and a point of purchase display at Time Warner retail locations. [Ex. Z; Ex. BB].

6. Among the methods ultimately decided upon to notify Time Warner Cable customers in New York City of the Channel Change was a voice broadcast recorded by Tim

¹ Citations in the form of "Ex. __" refer to exhibits to the Declaration of Sharon L. Schneier, dated May 15, 2015.

Gunn, a celebrity mentor who appears on "Project Runway," which was to be delivered as a telephone message. [Ex. AA; Ex. CC; Ex. DD].

7. Lifetime wished to reach out to Time Warner Cable customers in New York City because those customers were affected by the Channel Change.

8. Time Warner Cable provided Lifetime with a list of zip codes which reflected the areas within New York City in which Time Warner Cable provided service, so that an appropriate list of telephone numbers for cable households in those zip codes could be secured. [See Ex. EE].

9. I arranged with Todd Hatley ("Hatley") of OnCall Interactive to facilitate the delivery of the telephone message at issue in this litigation. I had previously worked with Hatley for four years (from 2004 to 2008) at a marketing firm and knew that he was familiar with voice broadcasting campaigns.

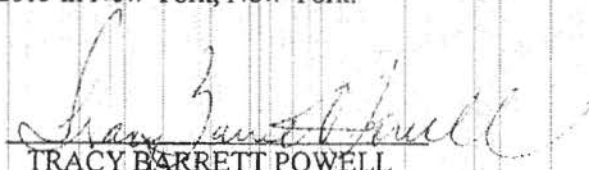
10. I forwarded to Hatley the list of New York City zip codes furnished by Time Warner Cable and directed him to obtain telephone numbers for cable households in those zip codes. Lifetime did not receive a copy of the list of telephone numbers to which OnCall Interactive (or an entity on behalf of OnCall Interactive) placed calls. It is my understanding that the calls were placed in accordance with the requirements of the "Do Not Call" registry and all applicable laws.

11. The script for the 20 second call was created in-house by Lifetime employees in accordance with directions I provided. [Ex. P].

12. Other than the complaint in this case, Lifetime did not receive any complaints about the Channel Change telephone message at issue in this litigation.

I, declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 15 day of May, 2015 in New York, New York.


TRACY BARRETT POWELL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

MARK LEYSE, individually and on behalf of all :
others similarly situated, :

Plaintiff, :

- against - :

LIFETIME ENTERTAINMENT SERVICES, :
LLC, :

Defendant. :
X

No. 13-cv-5794 (AKH)

DECLARATION OF SARA EDWARDS HINZMAN

Pursuant to 28 U.S.C. § 1746, I, SARA EDWARDS HINZMAN, declare and state as follows:

1. I am Vice President, Distribution at A&E Television Networks, LLC ("AETN").

AETN is a global entertainment media company with ten distinctive television channels including Lifetime®. AETN officially acquired Lifetime® as of September 15, 2009 as part of its acquisition of defendant Lifetime Entertainment Services, Inc. ("Lifetime" or "Defendant"). I submit this declaration in support of Defendant's motion for summary judgment. This declaration is based on facts within my personal knowledge and/or information supplied by persons employed by AETN.

2. Defendant owns and operates the Lifetime cable television channel. Its programming includes original scripted series, non-scripted reality series, and movies, as well as syndicated programming that originally appeared on network television (such as episodes of "Frasier," "How I Met Your Mother," and "Grey's Anatomy"). Lifetime also operates two other cable channels, LMN® and LRW®.

3. In July and August 2009, I held a similar position for Lifetime as I do now. As part of my duties and responsibilities in 2009, I was responsible for the distribution and promotion of the Lifetime channel with, among others, various programming distributors, including cable providers such as Time Warner Cable.

4. Lifetime, LMN, and LRW were distributed in Manhattan, Brooklyn, Queens, Bronx and Staten Island by Time Warner Cable in 2009. The Lifetime channel was also available in 2009 in New York City to customers of other competing television programming providers, including cable (such as RCN and Cablevision), satellite (such as DirecTV and Dish), or through television service provided by a telephone company (such as Verizon's FIOS service). Time Warner Cable competed with these distributors at the time, but Time Warner Cable's penetration throughout the city was far deeper than theirs. (For example, Verizon's FIOS service only provided limited service in the five boroughs having obtained a television franchise for the first time in 2008.) In 2009, Time Warner Cable was the predominant provider of subscription television service in New York City.

5. While many Americans grew up with free access to television programming over the broadcast airwaves, the television viewing landscape has changed dramatically over the past 20 years. The vast majority of Americans receive their television programming nowadays by subscribing to, and paying, either a cable or telephone company or satellite provider. The content they receive through such subscriptions includes both cable-only channels, such as Bravo and Lifetime, and broadcast channels such as ABC, CBS, NBC, and FOX. The Nielsen Company, a research organization that monitors people's television viewing habits, reports that in 2003, only 16% of American television households accessed their television programming over the airwaves, while 84% paid for their television programming. By 2012, only 9% of

American television households received their television programming over the airwaves; the remaining 91% subscribed to paid television. [See Ex. Y]¹

6. Because at least 91% of all television households now pay a monthly subscription fee to access television (broadcast and cable channels), it is no longer true that broadcast television is free to all, while cable television costs money. Instead, most viewers pay for both broadcast and cable television.

7. Local broadcast stations (or the networks that own them in the case of those local stations that are owned and operated by one of the networks) charge cable operators retransmission fees. These are the fees that cable companies pay for the right to carry the broadcast channels' television signals. These fees are passed on to cable customers as part of their monthly subscription fees. If a cable operator objects to paying a particular broadcaster's retransmission fee, that broadcaster can refuse to allow its signal to be carried, as happened in their carriage dispute of 2013 when CBS's programming was "blackout" for a few weeks on Time Warner Cable in New York City.

8. Cable channels like Lifetime similarly charge carriage fees to cable providers for the right to carry their signal, which fees are also passed along to cable subscribers as part of their monthly subscription fees.

9. Broadcast stations and most cable channels also both earn ad sales revenues by selling time slots during their programs to advertisers, who pay for the ability to televise commercial announcements during breaks in the programming. (The exceptions are premium, pay-cable channels that charge separate subscription fees, such as HBO and Cinemax. Time Warner Cable offered premium channels in 2009 and does so today.)

¹ Citations in the form of "Ex. __" refer to exhibits to the Declaration of Sharon L. Schneier, dated May 15, 2015.

10. While broadcasters and cable operators now have similar business models (relying on advertising sales and retransmission/carriage fees in exchange for content), this has not always been true. The federal law that requires cable and satellite companies to obtain permission to retransmit broadcast content was passed in 1992. Local broadcasting stations did not begin demanding retransmission consent fees from cable system operators until the mid-2000s, and the fees have risen dramatically since 2008.

11. In 2009, as now, Time Warner Cable in New York City offered its subscribers the choice of several differently-priced packages of television channels, with the least expensive being a package that consisted of broadcast channels and a few public, educational, governmental, and shopping channels (currently called "Starter TV"). [Ex. W].

12. Neither Bravo nor Lifetime was available to subscribers of the least expensive Time Warner Cable package in 2009, but both were available in all of the other packages offered by Time Warner Cable at that time for no additional fee above the applicable monthly subscription price. [Ex. X]. In other words, subscribers (in 2009 and today) paid one monthly fee for which they got access to a package that included Lifetime, Bravo and dozens of other channels.

13. Lifetime's viewers do not now, and did not in 2009, subscribe directly to Lifetime or AETN, or pay any fees directly to Lifetime or AETN.

14. "Project Runway," a reality show featuring a clothing design competition, has aired on the Lifetime channel since August 20, 2009. It is only available on Lifetime and is not aired on broadcast television. Prior to August 2009, it appeared on Bravo, another cable (not broadcast) channel. When "Project Runway" moved to the Lifetime channel in 2009, the channel packages of cable subscribers who received Lifetime, would also have included Bravo,

and these subscribers would not have had to make any additional purchase or pay an increased subscription fee in order to watch "Project Runway" after the switch.

15. In August 2009, Lifetime was moving from its long-held Channel 12 position to a new channel – Channel 62 – on the Time Warner Cable line-up. The channel change only affected Time Warner Cable customers in the New York City area. The channel change coincided with the Sixth Season premiere of "Project Runway." Lifetime was concerned that viewers who had watched the show for five previous seasons on Bravo would not know that the show was now on Channel 62 on Lifetime, particularly since Bravo was continuing to run Seasons One through Five of "Project Runway" on its own cable channel.

16. Time Warner Cable and Lifetime collaborated on strategies to inform Time Warner Cable customers about the channel change for Lifetime. Some of those strategies were executed by Time Warner Cable and others by Lifetime. As part of that collaboration, Lifetime reached out to Barbara Kelly ("Kelly"), Senior Vice President/General Manager at Time Warner Cable, who was at that time in charge of Time Warner Cable for the five boroughs, Westchester and Connecticut. Kelly provided Lifetime with all of the zip codes for the areas in which their subscribers lived in New York City. [Ex. EE.]

17. Time Warner Cable knew Lifetime would use the zip codes in conjunction with a campaign to deliver a pre-recorded telephone message to Time Warner Cable customers. [See Exs. Z & AA.]

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 5 day of May, 2015, in New York, New York.



SARA EDWARDS HINZMAN

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of:)	
)	Docket No. _____
Lifetime Entertainment Services, LLC)	
Petition for Declaratory Ruling to Clarify)	
Scope of Rule 64.1200(a)(3) or, in the)	
Alternative, for Retroactive Waiver)	

PROOF OF SERVICE

Pursuant to Commission Rule 1.47, I hereby certify that on December 11, 2015, I served
Petition for Declaratory Ruling or, in the Alternative, for Retroactive Waiver filed by Lifetime
Entertainment Services, LLC by U.S. mail on the following:

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December 11, 2015